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Nos. 85-1279, 85-1280 and 85-6404

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In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED NUCLEAR CORPORATION, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

AMERICAN MINING CONGRESS, PETITIONER

v.

LEE M. THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.

CHAUNCEY KEPFORD, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Uranium Mill Tailings Radiation Control Act of 1978 requires the Administrator of the Environmental Protection Agency (EPA) to make a finding of significant risk in promulgating standards under the Act (No. 85-1279).

2. Whether that Act authorizes the EPA Administrator to establish general standards that apply within the boundaries of disposal sites for uranium mill tailings (No. 85-1280).

3. Whether, in promulgating standards under that Act, the EPA Administrator gave adequate consideration to alternative measures focusing on protection of the public health and the environment after 1,000 years (No. 85-6404).

4. Whether there was improper Executive Branch influence on the promulgation of the EPA standards governing inactive sites (No. 85-6404).

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-42a, 43a-64a)[1] are reported at 772 F.2d 617 and 772 F.2d 640.[2]

JURISDICTION

The judgments of the court of appeals were entered on September 3, 1985. Petitions for rehearing were denied on October 30, 1985 (Pet. App. 209a-210a, 211a-212a). The petitions for writs of certiorari were filed on January 28, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTE INVOLVED

Relevant portions of the Uranium Mill Tailings Radiation Control Act of 1978, 42 U.S.C. 2022, 7901, are reproduced at Pet. App. 213a-216a.

STATEMENT

1. a. Uranium and thorium mill tailings are a waste byproduct of the processing of uranium ore. After processing, the ore yields a uranium-rich compound called "yellow cake" and a residue (typically of coarse sand) constituting the mill tailings. The yellow cake is a very small percentage (about 0.15%) of the original material. Pet. App. 128a. The rest of the ore thus must be disposed of as mill

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[1] Unless otherwise noted, "Pet. App." references are to the separately bound appendix to the petition in No. 85-1279.

[2] The Agency standards at issue in those proceedings and the Environmental Protection Agency (EPA) Administrator's preamble to those rulemaking proceedings are reported at 48 Fed. Reg. 590 (1983) (Pet. App. 65a-121a), and 48 Fed. Reg. 45926 (1983) (Pet. App. 122a-208a). The standards are codified at 40 C.F.R. Pt. 192, Subpts. A-E.

tailings. Uranium ore processing operations produced about 160 million tons of tailings between 1948 and 1970. About 25 million tons, one-sixth of this total, are stored in piles at 24 inactive sites,[3] 1 Office of Radiation Programs, U.S. Environmental Protection Agency, *EPA 520/4-82-013-1, Final Environmental Impact Statement for Remedial Action Standards for Inactive Uranium Processing Sites (40 CFR 192)*, 15-18, 20-21 (Table 3-1) (1982) [hereinafter cited as *Inactive Sites FEIS*]. Tailings piles at the inactive sites cover an estimated total of 1,000 acres, in areas of from 5 to 150 acres at individual sites, and range in height from a few feet to as much as 230 feet. The quantity of tailings at individual inactive sites ranges from trace amounts to approximately 2.7 million tons. Pet. App. 74a; 48 Fed. Reg. 592 (1983).

The rest of the mill tailings are at "active sites": primarily operating uranium mills licensed by the Nuclear Regulatory Commission (NRC) or by the state in which they are located.[4] By early 1983, the total amount of stored tailings at the active sites had reached about 175 million metric tons, with the size of individual tailings piles ranging from 2 to 30 million metric tons. That quantity is expected to at least double by the year 2000. Pet. App. 128a-129a; 48 Fed. Reg. 45927 (1983).

b. Mill tailings contain hazardous materials, both radioactive and nonradioactive. The most significant

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[3] Inactive sites include both inactive mill sites and depository sites (42 U.S.C. 2022(a)).

[4] As of January 1983, there were 14 such licensed uranium mills in operation. Although the regulations at issue here also apply to thorium mill tailings, the only major thorium mill licensed is not operating. 48 Fed. Reg. 45927.

of these materials is radium, a product of radioactive decay.[5] The decay of radium, in turn, produces radon, a radioactive gas that can escape from the tailings into the environment. The amount of radon gas released into the air remains constant for many thousands of years—essentially indefinitely. *Inactive Sites FEIS* 15-18.[6]

The radioactive constituents of uranium mill tailings, such as radium and radon, have been determined to be carcinogenic and can contribute to genetic and fetal damage. These hazards arise because (1) the radioactive decay products of radon may be inhaled, increasing the risk of lung cancer; (2) individuals may be exposed to penetrating gamma radiation from the tailings; and (3) radioactive and toxic materials may be ingested with food or water. Pet. App. 74a-75a; 48 Fed. Reg. 45928 (1983).

2. a. On November 8, 1978, Congress enacted the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA), Pub. L. No. 95-604, 92 Stat. 3021 *et seq.* Its action was based on the specific finding (§ 2 (a), 42 U.S.C. 7901(a)) that:

> uranium mill tailings located at active and inactive mill operations may pose a potential and significant radiation health hazard to the public, and that the protection of the public health, safety, and welfare and the regulation of interstate commerce require that every reasonable effort be made to provide for the stabilization, disposal, and control in a safe and environmentally

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[5] Other potentially hazardous mill tailings constituents include arsenic, molybdenum and selenium (Pet. App. 75a; 48 Fed. Reg. 45928 (1983)).

[6] Some of the non-radioactive toxic chemicals also persist indefinitely (48 Fed. Reg. 45928 (1983)).

> sound manner of such tailings in order to prevent or minimize radon diffusion into the environment and to prevent or minimize other environmental hazards from such tailings.

The Act accordingly established a program for remedial action at both active and inactive sites (§ 206 (a), 42 U.S.C. 2022).

The Act conferred the principal responsibility for the actual implementation of the inactive mill site remedial action program on the U.S. Department of Energy (DOE) and its Secretary (§§ 102-108, 42 U.S.C. 7912-7918). The United States Environmental Protection Agency (EPA) and its Administrator were directed to promulgate general standards for the implementation of the DOE remedial program (§§ 206(a), 108(a), 42 U.S.C. 2022, 7918(a)).[7]

The Act also sought to "control * * * tailings [at active sites] in a safe and environmentally sound manner and to minimize or eliminate radiation health hazards to the public" (§ 2(b)(2), 42 U.S.C. 7901(b)(2)). It did so, first, by expanding the definition of "by-product material" under the Atomic Energy Act of 1954 (AEA), 42 U.S.C. (& Supp. II) 2011 *et seq.*, to include uranium and thorium mill tailings, thereby bringing such tailings within the scope of NRC's licensing authority under that Act (§ 201, 42 U.S.C. 2014(e)(2) (see 42 U.S.C. 2111-2114)). Second, UMTRCA required NRC to regulate mill operations and disposal sites, through the NRC-administered licensing process of the AEA, so as to control mill tailings in accordance with general standards promulgated by EPA. Congress required

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[7] DOE must also consult with the Secretary of the Interior, and obtain the concurrence of the NRC in remedial actions selected (§ 108(a)(1), 42 U.S.C. 7918(a)(1)).

EPA to "promulgate * * * standards of general application for the protection of the public health, safety, and the environment from radiological and nonradioactive hazards associated with the possession, transfer, and disposal of" tailings at licensed disposal sites (which may be existing mill tailings sites or other sites to which tailings may be moved). § 206(a), 42 U.S.C. 2022(b)(1).

b. As originally enacted, Section 206(a) of UMTRCA, 42 U.S.C. 2022, imposed upon EPA a one-year deadline for the development of final remedial action standards for inactive sites, and an 18-month deadline for the final active site standards. When the Administrator failed to meet either of these deadlines, Congress, reflecting its dissatisfaction with the delay, amended Section 206 to extend the deadline for inactive site standards to October 1, 1982, and to require, in the event the extended deadline was not met, that remedial action should commence, utilizing the standards which had been proposed by the Administrator in April 1980. The amendment also required the Administrator to promulgate final active site standards by October 1, 1983, and provided that, if the Administrator failed to take final action by that date, authority to promulgate active site standards would pass to the NRC. Act of Jan. 4, 1983, Pub. L. No. 97-415, § 18(a)(1), 96 Stat. 2077, amending 42 U.S.C. 2022(a). At the same time, Congress added a sentence to Section 206(a) of UMTRCA (42 U.S.C. 2022(b)) to clarify the range of factors it intended the Administrator to consider in developing the standards:

> In establishing such standards the Administrator shall consider the risk to the public health, safety, and the environment, the environmental

> and economic costs of applying such standards, and such other factors as the Administrator determines to be appropriate.

§ 22(b)(2), 96 Stat. 2080, amending 42 U.S.C. 2022(b)(1).

3. EPA had already proposed inactive site standards when the 1982 amendments to UMTRCA were enacted. In April 1980, the Administrator proposed "cleanup" standards to govern the cleanup of tailings which had been transported from a "processing site" to a nearby "vicinity property". 45 Fed. Reg. 27370.[8] Proposed standards for disposal of tailings removed from vicinity properties and for those located in the original tailings piles were published in January 1981 (46 Fed. Reg. 2556).

The proposed standards applicable to the permanent stabilization of the tailings piles included a radon emission limitation (expressed technically as a radon "flux" standard) of 2 picocuries per square meter per second (2 pCi/m^2s), together with a requirement that the means used to limit radon flux be designed to provide a reasonable expectation that releases would be controlled for 1,000 years. These standards also included limitations on releases of contaminants to groundwater and surface waters which reflected generally prevailing EPA water quality standards. The proposed standards applicable to offsite land and buildings generally provided for cleanup of offsite land to a level of 5 pCi/g of contamination, and of buildings to a level of .015 work-

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[8] A "processing site" is the premises on which a processing mill and its attendant tailings piles are located, and "vicinity properties" are offsite locations to which tailings from the mill have been dispersed. See §§ 101(6), 102(a)(1) and (e)(1), 42 U.S.C. 7911(6), and 7912(a)(1) and (e)(1).

ing levels.[9] The proposed standards also provided an exception procedure allowing DOE, under certain described circumstances, to engage in remedial actions which did not meet the applicable standards, so long as such actions came "as close to meeting the [disposal] standard[s] * * * as is reasonable" under the circumstances. 46 Fed. Reg. 2563 (1981).

On January 5, 1983, after consideration of the extensive comments received, the Administrator promulgated final standards for Remedial Actions at Inactive Uranium Processing Sites (Pet. App. 65a-121a; 48 Fed. Reg. 590).[10] He noted (Pet. App. 65a-66a):

> The purpose of most of [the] changes [from the proposed standards] is to make implementation easier and less costly. The changes should not result in any substantial loss of health or environmental protection over that which would have been provided by the proposed standards.

The Administrator proposed active site standards for mill tailings at currently licensed milling sites on April 29, 1983 (48 Fed. Reg. 19584). Permanent

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[9] Working levels (WL) is a measure of concentration of radioactivity in air.

[10] The principal changes from the proposed standards were to set the radon emission limit at 20 pCi/m^{2}s rather than at 2 pCi/m^{2}s; to qualify the proposed 1,000-year longevity requirement by adding the phrase "to the extent reasonably achievable", and by adding a 200-year minimum longevity requirement; to set the cleanup standard for land at 15 pCi/g (instead of 5 pCi/g) for soil layers more than 15 centimeters below the surface; to establish a goal of .02 WL annual average indoor random concentration (and a maximum of .03 WL), instead of the proposed standard of .015 WL; and to delete proposed provisions which, in effect, prohibited any degradation of surface waters or groundwater by contaminants from the tailings.

disposal of the waste was to be designed to provide reasonable assurance that the average radon emissions from the tailings pile would not exceed 20 picocuries per square meter of the pile per second (20 pCi/m^2s).[11] The proposed standards provided for protection of groundwater to a level generally comparable to the protection required for surface impoundments under EPA regulations promulgated pursuant to the Solid Waste Disposal Act, 42 U.S.C. (& Supp. II) 6901 *et seq.*

On September 30, 1983, after considering all comments,[12] the Administrator promulgated the final active site standards. Pet. App. 122a-208a; 48 Fed. Reg. 45926.[13] In so doing, he concluded that uranium mill tailings "pose a present hazard to human health" and pose an additional substantial hazard for "an essentially indefinite period," due primarily to the long-term radiation hazards (Pet. App. 130a).[14] His

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[11] The size of the pile subject to this standard could be reduced by cleaning up the surrounding area to a standard of 5 pCi/g of radium for surface soil and 15 pCi/g of subsurface soil.

[12] Several hundred written comments were received, in addition to oral testimony from 34 witnesses at hearings held in Washington, D.C. and Denver, Colorado. "Comments were received from a broad spectrum of participants, including private citizens, public interest groups, members of the scientific community, representatives of industry, and State and Federal agencies." Pet. App. 125a-126a.

[13] Changes were made to several aspects of the groundwater protection requirements in response to comments (48 Fed. Reg. 45927 (1983)).

[14] Indeed, he concluded that "[i]n the long run the future risks to health of indefinitely extended contamination from misused and dispersed tailings due to inadequate control

estimates of the magnitude of the health risks were based on a widely-accepted scientific hypothesis that any radiation dose poses some risk, and that the risk from low doses is directly proportional to the risk that has been demonstrated at higher doses (*id.* at 131a). The final standards are based, however, on the recognition that "[i]t is not possible to reduce the risk to zero" and that deciding on the appropriate standard required an evaluation of the practicality, benefits, and technical difficulties associated with different levels of control (*id.* at 133a).

The final active site standards are divided into two parts. The first part applies to the management of tailings piles during and after cessation of milling operations but prior to completion of final disposal (Pet. App. 203a). The second part specifies the conditions to be achieved by final disposal (*id.* at 205a). The final active site disposal standards require long-term controls over emissions of radon gas from tailings piles: final disposal systems must provide reasonable assurance that average radon emissions from the "disposal area" do not exceed 20 pCi/m^{2}s for 1,000 years after disposal "to the extent reasonably achievable, and, in any case, for at least 200 years" (*id.* at 205a-206a).[15] Reducing radon emissions to

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overshadows the short-term danger to public health" (Pet. App. 130a).

[15] As in the proposed rule, the "disposal area" is defined according to how much cleanup would render land suitable for general use. This cleanup standard, as in the proposal (see note 11, *supra*), is 5 pCi/g for surface soil and 15 pCi/g for subsurface soil; any area that is cleaned up to these levels will not be considered a "disposal area" subject to the post-disposal radon emission standard or the primary groundwater protection requirements. Pet. App. 205a-206a.

this level eliminates more than 95 percent of the lung cancer risk associated with mill tailings. 2 Office of Radiation Programs, U.S. Environmental Protection Agency, *EPA 520/1-83-008-2, Final Environmental Impact Statement for Standards for the Control of Byproduct Materials from Uranium Ore Processing (40 CFR 192)*, at A.1-24 (1983) (response to comment 7) [hereinafter cited as *Active Sites FEIS*].[16]

4. Petitioners and others challenged both sets of standards by filing timely petitions for review pursuant to 42 U.S.C. 2022(c)(2).[17] In support of their challenges, petitioners raised numerous legal and technical objections, including the arguments pressed here. The court of appeals rejected all of petitioners' objections in separate opinions issued on September 3, 1985.[18]

The court of appeals, relying on the statutory findings, held that EPA was not required to find that the mill tailings piles pose a "significant risk" before promulgating regulations under the UMTRCA (Pet. App. 136a). It also found unpersuasive United Nuclear Corporation's (UNC) arguments, identical to those urged here, that the 1982 amendments and their

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[16] EPA estimated that "without control, the radon released directly from all tailings currently in existence at presently (1983) licensed sites would cause about 500 lung cancer deaths per century. * * * By the year 2000 * * * without control, the amount of tailings existing then would cause approximately 600 lung cancer deaths per century (Pet. App. 136a).

[17] Petitioner Kepford petitioned for review only of the active site regulations (Pet. App. 1a, 43a).

[18] It did find that the inactive site standards were inadequate in not providing for groundwater protection, and remanded the case to the agency "for further consideration of that specific provision" (Pet. App. 39a-42a).

legislative history signaled a significant change in the congressional approach to risk evaluation (Pet. App. 17a-19a, 50a).

The court of appeals noted that the "strict distinction between the EPA operating outside site boundaries and the NRC operating on-site" (Pet. App. 21a) originated in the standard-setting authority transferred to EPA from NRC's organizational predecessor, the Atomic Energy Commission, by the 1970 Reorganization Plan which created EPA.[19] However, the court concluded that neither the statutory language, the legislative history, nor the underlying congressional purpose supported the contention that "this strict distinction" also applied in the case of the standard-setting authorized by UMTRCA (Pet. App. 21a, 50a, 54a-55a).

Finally, the court of appeals rejected petitioner Kepford's complaint that EPA did not adequately consider the alternative of deep well disposal of mill tailings, noting that "EPA acted within its powers in rejecting this method, rationally finding it had potential for more serious ground water contamination" (Pet. App. 58a). The court of appeals did not find it necessary to address specifically petitioner Kepford's contentions concerning the asserted improper involvement of the Office of Management and Budget in the standard development process.

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[19] The Reorganization Plan, in pertinent part, defined the standard-setting authority in terms of "limits on radiation exposures or levels, or concentrations or quantities of radioactive material, in the general environment outside the boundaries of locations under the control of persons possessing or using radioactive material." Reorganization Plan No. 3 of 1970, 3 C.F.R. 1072 (1966-1970 comp.).

ARGUMENT

The decisions of the court of appeals are correct and do not conflict with any decision of this Court or of any other court of appeals. Accordingly, they do not warrant review by this Court. Contrary to petitioners' assertions, the court of appeals applied the plain meaning of the statute; its decisions are in keeping with the legislative history, and the court did not err in recognizing that the Act vested EPA with a substantial measure of discretion to establish limitations for uranium mill tailings. The standards in question were promulgated after careful review of all comments and a detailed analysis of scientific evidence; they are well supported by the administrative record.

1. a. No significant risk finding is required under UMTRCA because Congress made that finding in enacting the statute. UMTRCA contains explicit congressional findings that because "uranium mill tailings located at active and inactive mill operations may pose a potential and significant radiation health hazard to the public * * * the protection of the public health, safety, and welfare * * * require that every reasonable effort be made to provide for the stabilization, disposal, and control * * * of such tailings in order to prevent or minimize radon diffusion into the environment and to prevent or minimize other environmental hazards from such tailings." § 2(a), 42 U.S.C. 7901(a). Based precisely on these findings, Congress determined "to provide * * * a program of assessment and remedial action at [inactive and active] sites, * * * in order to stabilize and control such tailings in a safe and environmentally sound manner and to minimize or eliminate radiation health

hazards to the public." § 2(b)(1), 42 U.S.C. 7901 (b)(1).

The legislative history confirms the plain statutory findings: "The [House] committee is convinced that all tailings pose a potential and significant radiation health hazard to the public." H.R. Rep. 95-1480, 95th Cong., 2d Sess. Pt. 2, at 29 (1978).[20] Because of this hazard, Congress directed the Administrator of EPA to formulate standards to be implemented by the remedial action program the Act established. § 206(a), 42 U.S.C. 2022(a).

In 1983, Congress revised Section 206(a) of UMTRCA to direct the Administrator to "consider" risks, costs and "other factors as the Administrator determines to be appropriate," in setting standards within this basic framework. Pub. L. No. 97-415, § 22(b)(1), 96 Stat. 2080. Those revisions changed neither the recital of risks in the legislative preamble, nor the directive to regulate set out in Section 206(a). Indeed, Congress at the same time set a tight deadline for completing this regulatory task. Congress was intent upon endorsing and expediting an approach already being followed; it did not revise the basic criteria which were to control the Admin-

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[20] The House Committee report further noted that: "[T]he dangers which accompany [the mill tailings radioactive decay process] will continue for a billion years. As a result of being for all practical purposes, a perpetual hazard, uranium mill tailings present the major threat of the nuclear fuel cycle." H.R. Rep. 95-1480, *supra*, Pt. 1, at 11. Senator Randolph, a leading sponsor of UMTRCA in the Senate, stated that "the hazardous wastes from uranium mills present a long-ignored threat to the health and safety of our citizens. Although these mill tailings are far less toxic than spent fuel or high level waste, they persist for long periods of time." 124 Cong. Rec. 36696 (1978).

istrator's task.[21] As the Conference Committee explained (H.R. Conf. Rep. 97-884, 97th Cong., 2d Sess. 47 (1982)):

> The conferees note that this language reflects accurately the current regulatory approach of the agenc[y]. The language agreed to by the conferees should not result in any delays in establishment of remedial action standards.

The principal purpose of the Senate's addition of references to specific factors in Section 206(a) of UMTRCA was to provide an explicit basis in statutory language for the Administrator's consideration of implementation costs in setting standards.[22] The

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[21] Thus, the amendments to Section 206(a) provided that, should the Administrator fail to issue final remedial action standards by the new deadline, the standards he had *already* proposed would become effective for the interim period between that date and "such time as the Administrator promulgates such standards in final form." 96 Stat. 2077.

[22] As explained by Senator Simpson, the bill's floor manager and chairman of the subcommittee responsible for the bill (128 Cong. Rec. S13052 (daily ed. Oct. 1, 1982)):

> [t]he conferees have agreed to include specific references in the appropriate sections of the Atomic Energy Act directing EPA and NRC, in promulgating such standards and regulations, to consider the risk to public health and safety, and the environment, the economic costs of such standards or regulations, and such other factors as EPA or NRC, respectively, determine to be appropriate. Essentially, we intend by this requirement that these agencies must balance the costs of compliance against the projected benefits to assure that there is a reasonable relationship between the two.

The remarks of Senator Schmitt—upon which petitioners United Nuclear Corporation (UNC) et al. rely (Pet. 17-18)—are much less significant. Senator Schmitt was not a "co-

Amendment in no way purports to alter the clear intent of the enacting Congress "that every reasonable effort be made to provide for the stabilization, disposal, and control * * * of such tailings in order to prevent or minimize radon diffusion * * * and * * * other environmental hazards from such tailings," and the direction to the EPA Administrator to issue specifically described remedial action standards to accomplish this result.[23] § 2(a), 42 U.S.C. 7901(a).

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sponsor of the 1982 UMTRCA Amendments," as petitioners assert. He simply sponsored an unrelated provision to restrict uranium imports, ultimately rejected by the House as not germane. See 128 Cong. Rec. S13292-S13293 (daily ed. Oct. 1, 1982); 128 Cong. Rec. H8802-H8809 (daily ed. Dec. 2, 1982). Accordingly, the remarks cited by petitioners—which were printed in the Congressional Record (128 Cong. Rec. S13293 (daily ed. Oct. 1, 1982)) but not delivered on the floor—should be disregarded to the extent that they are inconsistent with the explanation of the bill's floor manager, Senator Simpson. See, *e.g.*, *Simpson* v. *United States*, 435 U.S. 6, 13-14 (1978); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942);

A similar pattern reoccurred in the House. The interpretations of the floor managers, Representative Udall and Ottinger, were consistent with the views of the Conference Report, while the inconsistent views of Representative Lujan of New Mexico, a member of the Conference Committee, were placed in the record as "extensions of remarks" one week after the floor debate. Compare 128 Cong. Rec. H8824-H8825 (daily ed. Dec. 2, 1982), with 128 Cong. Rec. E5059-E5061 (daily ed. Dec. 10, 1982).

[23] Senator Hart, the ranking minority member of Senator Simpson's subcommittee explained in floor debate (128 Cong. Rec. S13292 (daily ed. Oct. 1, 1982)): "none of these amendments affects the Findings and Purposes section of the Uranium Mill Tailings Act".

b. UNC relies upon this Court's decision in *Industrial Union Dep't* v. *American Petroleum Inst.*, 448 U.S. 607 (1980), as support for the proposition "that new standards designed to abate insignificant risks are 'unreasonable' " (Pet. 14). The court of appeals correctly concluded that *Industrial Union* is inapplicable in the instant context. The Court's conclusion there turned on the language of the Occupational Health and Safety Act of 1970 (OSHA), 29 U.S.C. (& Supp. II) 651 *et seq.* As the Court explained (448 U.S. at 642 (emphasis in original)):

> By empowering the Secretary to promulgate standards that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment," [Section 3(8) of] the Act [(29 U.S.C. 652(8))] implies that, before promulgating any standard, the Secretary must make a finding that the workplaces in question are not safe. * * * [A] workplace can hardly be considered "unsafe" unless it threatens the workers with a significant risk of harm.
>
> Therefore, before he can promulgate *any* permanent health or safety standard, the Secretary is required to make a threshold finding that a place of employment is unsafe—in the sense that significant risks are present and can be eliminated or lessened by a change in practices.

Thus, the plurality's holding in *Industrial Union* was based on OSHA's specific statutory scheme, which gave the Secretary of Labor broad authority to regulate work place safety according to priorities that *he* was to determine (448 U.S. at 643-644).

In sharp contrast, in enacting UMTRCA, Congress explicitly found that mill tailings at active and inactive sites "may pose a potential and signifi-

cant radiation health hazard to the public, and that the protection of the public health, safety, and welfare * * * require that every reasonable effort be made to provide" methods to reduce that risk (§ 2 (a), 42 U.S.C. 7901(a)). In light of that finding, there was no need for any agency reaffirmation of the risk identified by Congress.[24] As the court of appeals observed (Pet. App. 16a): "[i]n the UMTRCA Congress commanded the EPA, the NRC, and the DOE to deal with the problems posed by uranium mill tailings."

2. Petitioner American Mining Congress (AMC) errs in contending that EPA may only establish standards that apply *outside* the boundaries of mill tailings sites.[25] The statute does not prohibit EPA from setting standards that apply within the boundaries of disposal sites, so long as they are generally applicable rather than site-specific.

Although the starting point for determining the meaning of a statute is its language (*American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 508 (1981)), AMC is unable to point to any language in the statute that supports its construction.

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[24] In any event, in the standard setting process, EPA in fact extensively analyzed the risks involved and found them to be significant. See pages 9-10, *supra*.

[25] Petitioner contends that this restriction has been violated in three respects: EPA's radon emission limit (or "flux" standard), which regulates the rate of radon releases from mill tailings piles; the radium-in-soil cleanup standard; and the "primary" and "secondary" ground-water standards, all of which operate inside the current boundaries of mill tailings disposal sites (AMC Pet. 7-8). The radium-in-soil cleanup standard, however, is designed to permit the release of land for unrestricted use; such land thereafter will no longer be "within" the site.

UMTRCA simply does not contain the "off-site" limitation urged by AMC. EPA is instead required to promulgate "standards of general application" to protect "the public health, safety, and the environment from radiological and non-radiological hazards associated with" mill tailings. § 206(a), 42 U.S.C. 2022(a) and (b)(1). Nothing in this mandate even remotely suggests that such standards may not apply within the boundaries of disposal sites. On the contrary, when this language is read in conjunction with the Act's statement of findings and purposes,[26] the plain meaning is that EPA *may* promulgate regulations that apply within the boundaries of such sites, when appropriate to protect public health and the environment.

AMC relies heavily on the requirement that EPA's standards must be "of general application." But this requirement prohibits EPA from promulgating *site-specific* standards; it does not prohibit regulations that apply *within the boundaries* of disposal sites. EPA's regulations are not site-specific; they are generic standards that apply to all disposal sites. EPA therefore has violated no statutory mandate.

b. The legislative history is consistent with the plain meaning of the statute. Indeed, the legislative history shows that Congress deliberately chose *not* to limit EPA's authority in the manner suggested by AMC.

In 1970, President Nixon signed Reorganization Plan No. 3, transferring to EPA some of the func-

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[26] "[E]very reasonable effort [must] be made to provide for the stabilization, disposal, and control in a safe and environmentally sound manner of * * * tailings in order to prevent or minimize radon diffusion into the environment." 42 U.S.C. 7901(a).

tions of the Atomic Energy Commission (subsequently reorganized in 1974 as the Nuclear Regulatory Commission). 3 C.F.R. 1072 (1966-1970 comp.). EPA was given the authority to set "generally applicable environmental standards", including "limits on radiation exposures or levels, or concentrations or quantities of radioactive materials, *in the general environment outside the boundaries* of locations under the control of persons processing or using radioactive material." § 2(a)(6) (3 C.F.R. at 1073) (emphasis added). The Reorganization Plan left unaltered the AEC's authority within such boundaries.

AMC argues (at 10-16) that, in enacting UMTRCA, Congress intended to codify all aspects of the division of responsibility between EPA and AEC (now NRC) set forth in Reorganization Plan No. 3, including the limitation on EPA's authority to set standards that apply only "in the general environment *outside the boundaries*" of licensed sites (*id.* at 10 (emphasis in petition)).[27] But this is not what happened.

In the House several bills worked their way through two different committees. Congressman Udall introduced H.R. 13382, 95th Cong., 2d Sess. (1978), which was referred to his Subcommittee on

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[27] AMC asserts (Pet. 11 n.14), that since UMTRCA as enacted uses the phrase "standards of general application," and Reorganization Plan No. 3 uses the phrase "generally applicable environmental standards," the reach of the standard-setting authority under both statutes is identical. The significant fact, however, is that the Reorganization Plan's explicit reference to standards which impose limits "in the general environment outside the boundaries" is conspicuously absent from UMTRCA. This omission demonstrates a deliberate congressional decision not to replicate the Reorganization Plan limitations in the UMTRCA.

Energy and the Environment of the Committee on Interior and Insular Affairs. Section 206 of that subcommittee's draft, dated July 27, 1978, added Section 275 to the Atomic Energy Act. It would have required EPA to "promulgate generally applicable standards for the protection of the general environment" from radiological and nonradiological hazards of mill tailings. It also specified that "such standards [shall] * * * impose limits on exposures or levels, or concentrations or quantities of hazardous materials *in the general environment outside the boundaries of*" processing or disposal sites (H.R. 13382, *supra*, at 15-16 (emphasis added))—the identical language found in Reorganization Plan No. 3 (3 C.F.R. 1072 (1966-1970 comp.)).

But, as reported by the full committee on August 11, 1978, the Udall bill (now numbered H.R. 13650, 95th Cong., 2d Sess.), no longer contained the language restricting EPA to "off-site" standards. The revised committee draft instead required EPA's standards to *protect the environment* outside such sites.[28]

That this change in language was deliberate and substantive is indicated by three factors. First, the Committee Report accompanying the bill conspicuously omits any reference to a site boundary limitation on EPA's authority. Nor is any such limitation mentioned in the summary of the bill, which merely refers to EPA's authority to protect the environment outside site boundaries. H.R. Rep. 95-1480, *supra*, Pt. 1, at 29. Second, in place of limiting EPA to "off-

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[28] As reported, the bill required EPA to "promulgate * * * generally applicable standards and criteria for protection of the general environment outside the boundaries" of processing and disposal sites. H.R. Rep. 95-1480, *supra*, Pt. 1, at 10.

site" standards, the report precluded EPA from promulgating "site-specific" requirements for "management, technology or engineering"—functions to be left to the NRC as the implementing agency (*id.* at 17). Third, the House report *enlarged* the types of requirements EPA would be authorized to establish; most relevant here, the report specifically indicated that EPA could regulate radon hazards by limiting the "quantities of the substances released [by a mill tailings pile] over a period of time" (*ibid.*) This is, of course, the radon emission (flux) standard approach which EPA decided to employ; it necessarily applies within the site boundaries, and the House report makes clear that EPA was to have the authority to issue such requirements (*id.* at 16-17, 21).

Concurrently with the proceedings in Congressman Udall's committee, Congressman Dingell's Subcommittee on Energy and Power of the Interstate and Foreign Commerce Committee was also considering H.R. 13650, where the pertinent legislative history was essentially duplicated. The subcommittee print dated August 4, 1978, required EPA to set standards "of general application" that "shall apply outside the boundaries * * *. However, this site boundary limitation was eliminated from the full Committee draft. In its place, as in the Interior Committee report, is simply a statement that "stresses that the EPA standards are not to be site-specific." H.R. Rep. 95-1480, *supra*, Pt. 2, at 46.

Thus, in both committees, the concept of a geography-based limitation on EPA's standard-setting authority evolved into a functional distinction based on EPA's and NRC's respective standard-setting and licensing roles: EPA would establish standards of

general applicability, and NRC would implement and enforce those standards on a site-specific basis.[29]

The Senate consideration of its bill is to the same effect. Senator Randolph, a co-sponsor of the Senate bill, in explaining its provisions to the Senate, pointed out that the relevant section-by-section analysis provides that the EPA Administrator is "to prescribe general standards of performance, not specific management requirements and not site specific" (124 Cong. Rec. 36697 (1978)). As examples of the kinds of "general standards" EPA was expected to promulgate, Senator Randolph cited "general requirements that sites be designed and managed to prevent any contact of the tailings by human or animal life * * *, general performance standards for stabilization of tailings * * * [and] [l]imitations on * * * emissions or other introduction of * * * constituents of mill tailings in the air or ground or surface waters" (*ibid.*). Such standards obviously would have to apply inside site boundaries.

The legislative history thus clearly supports the Administrator's construction of the Act, if any aids to interpretation are necessary. Both houses of Congress accepted a final bill that eliminated the very proscription against "on-site" regulation that AMC

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[29] Following the House's passage of H.R. 13650, that bill was put before the Senate (124 Cong. Rec. 36687 (1978)), which had already considered its own bill. Senator Garn, Chairman of the Nuclear Regulatory Subcommittee of the Senate Committee on Energy and Natural Resources, proposed an amendment (S. 2099, 95th Cong., 2d Sess. (1978)) in the nature of a substitute to the House-passed bill (124 Cong. Rec. 36688 (1978)). The Garn amendment was adopted and passed by the Senate (*id.* at 36699). The House then approved the Senate bill, with amendments not relevant here (*id.* at 38230).

claims to find in the law.[30] Both houses of Congress specifically mention on-site control measures, including a radon emission (flux) standard, as among the tools at EPA's disposal. As ultimately enacted, the law delineates a sensible division of responsibility between EPA and NRC that is based on their respective functions (general standard setting vs. site-specific licensing and implementation), while recognizing that EPA's regulations apply on-site as necessary to achieve the Act's goals of protecting against the potentially serious and long-term nature of the hazard involved.

3. a. Petitioner Kepford argues (at 16-18) that, in promulgating the challenged standards, the EPA Administrator failed to give adequate consideration to the disposal of uranium mill tailings in abandoned deep mines, or other long-term control strategies, in violation of Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C).

Every court of appeals that has considered the question has concluded that NEPA's procedural requirements relating to the preparation of an Environmental Impact Statement (EIS) do not apply to EPA's regulatory activities.[31] Here, the standards at

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[30] Indeed, as finally enacted, the legislation does not even limit EPA's authority to protection of the general environment "outside the boundaries," as the Udall Committee bill had provided; instead, it broadly directs EPA to protect against the hazards associated with mill tailings.

[31] *E.g., Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 379-387 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974); *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 676 (1st Cir. 1974); *Duquesne Light Co.* v. *EPA*, 481 F.2d 1, 9 (3d Cir. 1973), vacated, 425 U.S. 987 and 427 U.S. 902 (1976);

issue have been promulgated by the Administrator pursuant to a substantive statutory mandate and statutory procedures that are clearly designed to "ensure full and adequate consideration of environmental issues." *Environmental Defense Fund, Inc.* v. *EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973). Petitioner's argument that the Administrator's standards must be vacated for failure to comply with NEPA's requirement for consideration of alternatives accordingly is without merit.[32]

In any event, NEPA requirements were satisfied here. EPA did consider requiring the disposal of mill tailings in abandoned deep mines, the only extremely long-term disposal technique suggested by petitioner Kepford, but rejected it in light of the serious risk of contamination to regional groundwater resources associated with that technique. Pet. App. 145a. The court of appeals found that EPA acted rationally in reaching this conclusion (Pet. App. 58a); NEPA thus would not require that it be further considered.[33]

Appalachian Power Co. v. *EPA*, 477 F.2d 495, 508 (4th Cir. 1973); *Buckeye Power, Inc.* v. *EPA*, 481 F.2d 162, 174 (6th Cir. 1973), cert. denied, 425 U.S. 934 (1976); *Indiana & Michigan Elec. Co.* v. *EPA*, 509 F.2d 839, 843 (7th Cir. 1975); *Anaconda Co.* v. *Ruckelshaus*, 482 F.2d 1301, 1305-1306 (10th Cir. 1973).

[32] The Agency has, since May 7, 1974, voluntarily undertaken the preparation of environmental impact statements as a part of its standard-setting process. This policy was implemented with the caveat that "[t]he voluntary preparation of impact statements, however, in no way subjects the Agency to the requirements of section 102(2)(C) of [NEPA]." 39 Fed. Reg. 37419. This policy was specifically invoked by the Agency in the draft Environmental Impact Statement.

[33] See Council for Environmental Quality Regulations at 40 C.F.R. 1502.14(a). The CEQ regulations are entitled to deference in construing the requirements of NEPA. *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979).

Since petitioner has suggested no other extreme long-term control strategy that merited further consideration by EPA, its failure to discover and extensively consider other control strategies for periods exceeding 1,000 years does not require that the standards be vacated. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553-554 (1978).

b. Although petitioner Kepford challenges no provision of the EPA standards at issue here as substantively defective, he argues (Pet. 2-8) that the regulations must be vacated and remanded for reconsideration because the Office of Management and Budget may have influenced EPA to inappropriately consider costs in determining the final form of the standards. In support of this argument, petitioner refers only to materials that relate to the EPA Administrator's standards for *inactive* uranium mill tailings sites. Pet. 4-5; Kepford Pet. Apps. E, F. Petitioner lacks standing to object to those standards here, since he did not challenge the inactive site regulations before the court of appeals.[34] In order to relate the cited materials to the proceedings below in the case in which he did participate, petitioner simply notes that "standards for active tailings [*sic*] were also under consideration by EPA at that time." Pet. 4. Petitioner's argument at best rests on no more than speculative inferences that the alleged improper influences on the inactive site regulations also affected the active site regulations. Hence, this contention, which was not presented in its present form below, does not warrant this Court's review.

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[34] This issue was not raised by any other petitioner in the separate proceedings before the court of appeals concerning those standards.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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